

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Pickens County
Alex Kinlaw, Circuit Court Judge

JUSTIN RYAN CONE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Opinion No. 2022-UP-323 (S.C. Ct. App. Filed August 3, 2022)

APPELLATE CASE NO. 2019-000437

APPENDIX

JESSICA M. SAXON
Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

TAYLOR Z. SMITH
Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Suite 519
Columbia, SC 29201

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Justin Ryan Cone, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2019-000437

Appeal From Pickens County
Letitia H. Verdin, Circuit Court Judge
Alex Kinlaw, Jr., Post-Conviction Relief Judge

Unpublished Opinion No. 2022-UP-323
Submitted June 1, 2022 – Filed August 3, 2022

AFFIRMED

Appellate Defender Jessica M. Saxon, of Columbia, for
Petitioner.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Taylor Zane Smith, of Columbia, for
Respondent.

PER CURIAM: Petitioner seeks a writ of certiorari from the denial of his application for post-conviction relief (PCR). Because there is sufficient evidence to support the PCR judge's finding that Petitioner did not knowingly and

intelligently waive his right to a direct appeal, we grant certiorari and proceed with a review of the direct appeal issues pursuant to *Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986).

On appeal, Petitioner argues the trial court erred in (1) allowing the solicitor to argue the victim's testimony need not be corroborated pursuant to section 16-3-657 of the South Carolina Code (2015), and (2) barring defense counsel from cross-examining the victim about specific punishments she had received for lying on previous occasions without first ruling on the evidence's relevance and its admissibility under Rule 403, SCRE. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in allowing the solicitor to reference section 16-3-657, we hold Petitioner's argument is not preserved for review because he did not contemporaneously object at trial. *See Webb v. CSX Transp., Inc.*, 364 S.C. 639, 657, 615 S.E.2d 440, 450 (2005) (finding CSX's failure to contemporaneously object to closing argument precluded it from raising issue on appeal). Further, Petitioner conceded this issue at trial when he admitted the solicitor could argue the statute during his closing. *See State v. Bryant*, 372 S.C. 305, 315-16, 642 S.E.2d 582, 588 (2007) (stating that because appellant conceded the court's ruling was not prejudicial, he could not assert on appeal that the court's ruling denied him a fair trial).

2. As to whether the trial court erred in barring defense counsel from cross-examining a witness about prior punishments she had received, we hold those questions were not relevant and, even if relevant, the questions had a substantial likelihood of confusing the jury. *See* Rule 401, SCRE ("Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence."); Rule 402, SCRE ("Evidence which is not relevant is not admissible"); Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); *State v. King*, 349 S.C. 142, 156, 561 S.E.2d 640, 647 (Ct. App. 2002) ("Though an-on-the-record Rule 403 analysis is required, [an appellate court] will not reverse the conviction if the trial [court]'s comments concerning the matter indicate [it] was cognizant of the evidentiary rule when admitting the evidence of [a defendant's] prior bad acts.").

AFFIRMED.¹

WILLIAMS, C.J., and KONDUROS and VINSON, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

JUSTIN RYAN CONE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000437

Appeal from Pickens County

Honorable William P. Keesley, Circuit Court Judge
Honorable Alex Kinlaw, Post-Conviction Relief Judge

Opinion No. 2022-UP-323

PETITION FOR REHEARING

On August 3, 2022, this Court affirmed the trial court's decision to allow the State to argue the specific statutory code section, S.C. Code Ann. § 16-3-657, to the jury when that law was not part of the jury charge, and to prohibit defense counsel from cross examining Minor on the specific punishments that she had received for lying. Cone v. State, Op. No. 2022-UP-323 (S.C. Ct. App. filed August 3, 2022). Pursuant to Rule 221(a), SCACR, Petitioner respectfully requests this Court rehear the matter considering the significant points overlooked and/or misapprehended by this Court discussed below.

Impropriety of the State arguing S.C. Code Ann § 16-3-657 to the Jury is Preserved

This Court found that Petitioner’s argument on appeal regarding the impropriety of the State arguing the specific statutory language of S.C. Code Ann. §16-3-657 was unpreserved because Petitioner failed to object contemporaneously and conceded the issue during trial. Respectfully, under the rules of error preservation, Petitioner’s argument is preserved for review and should be addressed on the merits.

“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review.” *Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). “The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve – intentionally or by chance – in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.” Jean Hoefler Toal et al., *Appellate Practice in South Carolina* (2016) 184. “However, [the error preservation requirement] is not a ‘gotcha’ game aimed at embarrassing attorneys or harming litigants.” *Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012).

“There are four basic requirements to preserving issues at trial for appellate review.” *S.C. Dep’t of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007) (quoting Jean Hoefler Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002)). “The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.” *Id.*

Generally, for an issue to be preserved, a party must make a “contemporaneous objection that is ruled upon by the trial court.” *State v. Sweet*, 374 S.C. 1, 5, 647 S.E.2d 202, 205 (2007). “However, there is a practical exception to this requirement when a judge makes an evidentiary ruling on the record immediately prior to the introduction of evidence. The rationale supporting this exception is that if no evidence is offered between the initial objection and the admission of the evidence, then there is no basis for the trial court to change its initial ruling.” *State v. Jones*, 435 S.C. 138, 144, 866 S.E.2d 558, 561 (2021), reh'g denied (Feb. 3, 2022), cert. denied (June 21, 2022), cert. denied, 142 S. Ct. 2843 (2022) (internal citations and quotations removed).

At the close of the evidence, the State requested that the trial court charge the jury that, pursuant to S.C. Code Ann. § 16-3-657, the testimony of a victim need not be corroborated because the State intended to argue that charge to the jury. App. 309, ll. 1-13. Counsel Sumner objected to the charge as an improper comment on the facts from the bench. App. 310, ll. 7-10. The trial court stated it would decide overnight whether it would charge the jury with S.C. Code Ann. § 16-3-657 but that it would not stop the State from arguing it to the jury because “[i]t’s the law and it’s proper to argue anything that’s in the law.” App. 310, ll. 15-18.

The following morning, the trial court ruled that it would not charge the section 16-3-657, noting in a thoughtful discussion that:

“That instruction has always bothered me and that language there is from charges I’ve given before... And it bothers me that I’m going to single out one witness and talk about one witness. I tell the jury that they may believe one witness against many or many against one. Which is the same thing... The last couple of times I have not charged this, I believe that’s my recollection is I have not charged this, and my intent is not to charge it in this case. But if the state objects and the state request the charge and it’s denied. Now, that doesn’t stop you from arguing it. It’s the law. You can argue it to the jury.”

App. 326-328.

The State then asked for permission to specifically reference the code section and statutory language during its closing. App. 328, ll. 8-10. Defense counsel objected to the State arguing the specific statute and statutory language stating “I would object to him opening on that point of law. I do respect the Court’s ruling that either of us can argue it, and he can argue that. But I don’t think that opening on the law is proper for anything other than the charge against Mr. Cone.” App. 328, ll. 13-19. The court ruled that the solicitor could argue § 16-5-657, the “no corroboration” statute, overruling defense counsel’s objection. App. 328, ll. 20-24. Defense counsel further stated “I don’t want to waive this just purely for appellate purposes. I do object to him referencing that in his opening on the law for the reasons I’ve stated. And as long as you say the records are protected, I’m not going to object during his actual opening [on the law] statement.” App. 329, l. 23-App 330, l. 4.

After a short break, the state decided not to open on the law, and defense counsel presented his final argument. App. 331, ll. 1-2; App. 332, ll. 10-16. The state then presented its closing argument during which it recited S.C. Code Ann. § 16-3-657 verbatim to the jury. App. 348, ll. 2-8; App. 351, l. 1-7. The court took a short recess before it charged the jury on the law. After the charge on the law, defense counsel renewed his objection to the State reciting S.C. Code Ann. §16-3-657 during closing arguments. App. 379, ll. 12-14.

The requirements of error preservation were met in Petitioner’s case. Defense counsel’s specific objection was to the State referencing the statute and the statutory language of S.C. Code Ann. §16-3-657. The objection was raised to and ruled upon by the trial court prior to closing arguments. Further, defense counsel renewed his objection after closing arguments. The court had ruled the State could argue the statute in closing arguments immediately before closing arguments began. Therefore, defense counsel was not required to object during the closing

argument to preserve the error for review. *See, State v. Jones, supra.* As our Supreme Court noted in *State v. Simmons*, 432 S.C. 552, 562, 816 S.E.2d 566, 571-72 (2018) counsel was not required to be a jack-in the box, repeatedly objecting, to successfully preserve the issue for appellate review.

This Court also found that defense counsel waived his objection, presumably when he stated, “I do respect the Court’s ruling that either of us can argue it, and he can argue that.” App. 328, ll. 13-19. This, however, was not a waiver of the objection but a recognition of the Court’s ruling. Further, Counsel renewed his objection shortly after that statement and again objected after closing arguments. App. 329, l. 23-App. 330, l. 4; App. 379, ll. 12-14. A fair reading of the record supports the conclusion that Petitioner’s argument regarding the impropriety of the State’s use of the S.C. Code Ann. §16-3-657 and statutory language during closing arguments is preserved for appellate review. Accordingly, Petitioner requests rehearing for this issue to be considered on merits.

Limiting Defense Counsel’s Cross-Examination of Minor

This Court found that the questions defense counsel had for Minor regarding prior forms of punishment she received for lying were not relevant and, if relevant, they had a substantial likelihood of confusing the jury. Respectfully, the evidence was highly relevant as it went to Minor’s credibility and veracity. Further, the trial court did not specify why it ruled the evidence inadmissible pursuant to Rule 403, SCRE.

Relevance

Relevant evidence is “any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. “Since it is the function of the jury to

determine the credibility of witnesses and the weight to be given their testimony, as a general rule, anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.” *State v. Brewington*, 267 S.C. 97, 100–01, 226 S.E.2d 249, 250 (1976) (internal citations and quotations omitted). Further, “on cross-examination, any fact may be elicited which tends to show interest, bias, or partiality’ of the witness.” *Id.*

The only evidence of the criminal sexual conduct alleged in Petitioner’s case was the testimony of Minor. There were no witnesses and no physical evidence. The case came down to the credibility and veracity of the witnesses who testified. Whether Minor was telling the truth was the only fact at issue. Any evidence bearing on Minor’s credibility and veracity was relevant. The questions defense counsel sought to ask Minor regarded the extreme and unusual punishment she had received for lying. Not only did the testimony “have a legitimate tendency to throw light” onto Minor’s truthfulness, but it also informed the jury as to why Minor would maintain her story, even if it was made up. Respectfully, the testimony defense counsel sought to elicit was relevant and should have been admitted.

Rule 403, SCRE Analysis

This Court further found that, even if relevant, the questions defense counsel sought to ask Minor were properly excluded under Rule 403, SCRE, because the questions had a substantial likelihood of confusing the jury. Respectfully, a Rule 403 analysis was not conducted by the trial court, and pursuant to this Court’s holding in *State v. Spears*, 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013), the matter should be remanded to the trial court to conduct a proper on-the-record balancing test.

In *Spears*, supra, this Court explicitly declined to conduct a de novo Rule 403 balancing test when the trial court failed to perform the requisite on the record analysis. *Spears* at 258, 742 S.E.2d at 883-84. That decision was in line with our Supreme Court's holding in *Colf* that held that when a balancing test is required, **it must be conducted by the trial court**. See *State v. Colf*, 337 S.C. 622, 629, 525 S.E.2d 246, 249 (2000) (emphasis added). Our Supreme Court wrote,

The Court of Appeals should not have undertaken the Rule 609(b) balancing test itself, but should have remanded the question to the trial court. In *Cavender*, the Fourth Circuit noted that it is precisely this absence of specific facts and circumstances that causes such cases to defy appellate review. It is difficult, if not impossible, for an appellate court to balance the interests at stake when the record does not contain the specific facts and circumstances necessary to a decision.

Colf, at 628–29, 525 S.E.2d at 249 (internal citation omitted).

As this Court noted in *Spears*, other courts have found that remand is proper where the factors used by the trial court, or the specific facts and circumstances supporting the trial court's ruling, do not appear in the record. Remand in these instances was proper because an appellate court was not able to effectively review the circuit court's decision to admit or exclude evidence when the reasoning of the trial court was not given. See *State v. Taylor*, 196 Ariz. 121, 817 O.2d 488, 492-93 (1991); *State v. McFarland*, 228 W.Va. 492, 721 S.E.2d 62, 73 (2011).

However, “[t]hough an on-the-record Rule 403 analysis is required, this Court will not reverse the conviction if the trial judge's comments concerning the matter indicate he was cognizant of the evidentiary rule when admitting the evidence.” *State v. King*, 349 S.C. 142, 156, 561 S.E.2d 640, 647 (Ct. App. 2002). In *King*, the trial court ruled on a Rule 404 and Rule 403, SCRE, matter stating

Well, to my mind logically, and correct me if I'm wrong if you got some authority, but that goes to the sense he's charged with possession with intent to

distribute drugs found right there, it's establishing his nexus or contact with that and she's been there, seen that and all that. To my mind, it's fair.

King at 157, 561 S.E.2d at 647. This Court found that, although the trial court had not given a thorough on-the-record analysis pursuant to Rule 403, SCRE, it had given a “compressed” analysis that contained “some indicia of his [the trial court’s] consideration of whether admission of the testimony was fair to King (i.e., more probative than prejudicial).” *Id.*

In Petitioner’s case, no such compressed ruling occurred, thus remand for the trial court to conduct a full Rule 403, SCRE, balancing test on the record would be proper. In ruling on the State’s objection pursuant to Rule 403, SCRE, the trial court stated

All right. The question about her being pushed in the shower and put under cold water, the Court finds that not relevant. If it is relevant, it’s excluded under 403. Now, I could see how it could become relevant, but based on the proffer that was given, I do not see that it is. The part about the television is relevant and it’s admissible.

App. 95, ll. 11-17.

There is nothing contained in the court’s ruling that indicates which factor in Rule 403, SCRE, was the basis for his ruling. The trial court did not articulate if the testimony was substantially more prejudicial than probative, if the testimony would confuse the issues, or if the testimony would mislead the jury. The trial court merely stated that the testimony was excluded under Rule 403 without offering any specific facts and circumstances to support its ruling and without expressing what factors it analyzed.

Respectfully, the ruling in Petitioner’s case was not a compressed Rule 403, SCRE, analysis with some indicia of the trial court’s awareness that he undertook some analysis, but a perfunctory ruling on the matter which precludes full appellate review of the matter. *See United States v. Ciesiolka*, 614 F.3d 347, 357 (7th Cir.2010) (Stating that a “perfunctory analysis is insufficient” and holding that “the district court abused its discretion in failing to propound

reasons for its conclusion that the probative value of [defendant's prior bad acts] was not substantially outweighed by the risk of unfair prejudice”). There was nothing in the record that could support a finding that the trial court excluded the evidence under any specific factor listed in Rule 403, SCRE. Simply naming the rule under which the evidence was challenged was not a compressed analysis that indicated what the trial court was based its ruling upon.

CONCLUSION

Petitioner respectfully request rehearing based upon the specific points overlooked and/or misapprehended by this Court in its opinion as discussed above.

Respectfully Submitted,

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender

This 16th day of August, 2022.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

Honorable William P. Keesley, Circuit Court Judge
Honorable Alex Kinlaw, Post-Conviction Relief Judge

JUSTIN RYAN CONE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000437

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Taylor Z. Smith, Esquire, at the primary email address listed within the Attorney Information System (AIS); and Justin Ryan Cone, #362238, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 16th day of August, 2022.

s/Jessica M. Saxon
Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Pickens County
Alex Kinlaw, Jr., Post-Conviction Relief Judge
William P. Keesley, Trial Judge
Appellate Case No. 2019-000437

JUSTIN RYAN CONE,

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STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR REHEARING

Justin Ryan Cone (“Petitioner”) has petitioned for rehearing, asking this Court to rehear his appeal. Petitioner takes issue with this Court’s findings: (1) that the issue of the State’s closing argument using the language in S.C. Code Ann. § 16-3-657 was unpreserved for direct appellate review; and (2) that Petitioner’s questions for the minor victim about punishments to which she had been subjected for lying were not relevant and, even if relevant, had a substantial likelihood of confusing the jury.

The State’s closing argument

During the State’s case-in-reply, the trial court asked if the parties were requesting that she charge the jury using the language of § 16-3-657 (“the statute”) that the victim’s testimony did not need to be corroborated. App. 308-09. The State requested that the charge be given and stated its intention to argue the matter during its closing argument. App. 309. The trial court said that the

use of the statute in closing argument had already been affirmed by an appellate opinion, but denied the State's request for the charge. App. 309-10, 327-28. The State asked for permission to reference the language of the statute while opening on the law during closing argument, and Petitioner conceded that the State could argue using the statute's language, but objected only to the State's doing so while opening on the law; the trial court overruled Petitioner's objection. App. 328-30. Petitioner's objection was rendered moot, however, because the State then waived its opening on the law. App. 331.

In closing, Petitioner argued that there was "not one piece, not one shred of independent corroboration [of the allegations against him] of any type," but conceded that "[t]he law doesn't require it." App. 340. The State argued that the statute provides that "[t]he testimony of the victim need not be corroborated," and noted that the trial court would charge the jury that it could weigh witness credibility however it saw fit. App. 351. Petitioner did not object to the State's argument based upon the statute at any point.

Petitioner argues that Petitioner objected to the State's arguing the specific language. Petition for Rehearing at 4. Respondent submits that Petitioner is not inaccurately characterizing the nature of his objection, which concerned only the State's argument upon the statute while it was opening on the law, not the propriety of the argument in and of itself. In other words, Petitioner's objection was to the timing of the argument, not to the substance of it, and that objection was rendered moot anyway when the State waived its opening on the law. Furthermore, Petitioner himself was the first party to inform the jury during closing argument that South Carolina law did not require the victim's testimony to be corroborated. Petitioner's statement that he respected the trial court's ruling and that the State could argue in reliance upon the statute was

an acknowledgement of the trial court's decision to allow the argument and a concession that the decision was correct. This Court should not grant rehearing on this issue.

Petitioner's cross-examination of the minor victim

When Petitioner cross-examined of the minor victim, the first question that he tried to ask her was whether she had told anyone that her father would make her take a cold shower while clothed if he caught her lying. App. 88-90. The State objected and, outside the presence of the jury, argued that Petitioner's questions on that topic should be prohibited as irrelevant and violative of Rule 403, SCRE. Petitioner argued that the issue was a proper subject of his cross-examination because the minor victim's credibility was central to the case. App. 90-91. The State countered that Petitioner should not be able to ask about "particular punishments" because there was too great a danger of unfair prejudice. App. 91. The trial court then asked if there was any evidence of interaction between the minor victim and her father regarding the child's sexual abuse allegations against Petitioner. App. 91. The trial court allowed Petitioner to examine the minor victim outside of the jury's presence and said that, afterwards, he would "tell them [the parties] what they can and cannot do" App. 93. After considering the proffered testimony, the trial court ruled as follows:

All right. The question about her being pushed in the shower and put under cold water, the [c]ourt finds that not relevant. If it is relevant, it's excluded under 403. Now, I could see how it could become relevant, but based on the proffer that was given, I do not see that it is. The part about the television is relevant and it's admissible.

App. 95.

This Court found, in complete agreement with the trial court, that Petitioner's questions were not relevant and, even if they were relevant, they were inadmissible under Rule 403. On these points, Respondent relies on the arguments presented in its brief. As to Petitioner's argument that this Court erred in finding, in reliance upon *State v. King*, 349 S.C. 142, 561 S.E.2d 640 (Ct. App.

2002), that the record indicates that the trial court was cognizant of Rule 403 when conducting its analysis of the parties' arguments, Respondent submits that it is apparent from the record that the trial court considered whether the probative value of the minor victim's testimony was substantially outweighed by the danger of unfair prejudice. The trial court found that the evidence was not relevant and then found that, even if it was relevant, it was prohibited under Rule 403. The trial court's juxtaposition between Rules 401 and 403 shows that it considered Rule 403. Obviously, the trial court determined that the evidence fell short of the requirement of Rule 401 and, as a consequence, any probative value that it had, if any, would necessarily be "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" Rule 403, SCRE. This Court did not err in its findings and should not grant rehearing.

CONCLUSION

In affirming, this Court did not overlook or misapprehend any point, and it should deny the petition for rehearing.

Respectfully submitted,

ALAN WILSON
Attorney General

TAYLOR ZANE SMITH
Assistant Attorney General
SC Bar No. 103282

By: 

ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

September 8, 2022

STATE OF SOUTH CAROLINA
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Certiorari to Pickens County
Alex Kinlaw, Jr., Post-Conviction Relief Judge
William P. Keesley, Trial Judge
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JUSTIN RYAN CONE,

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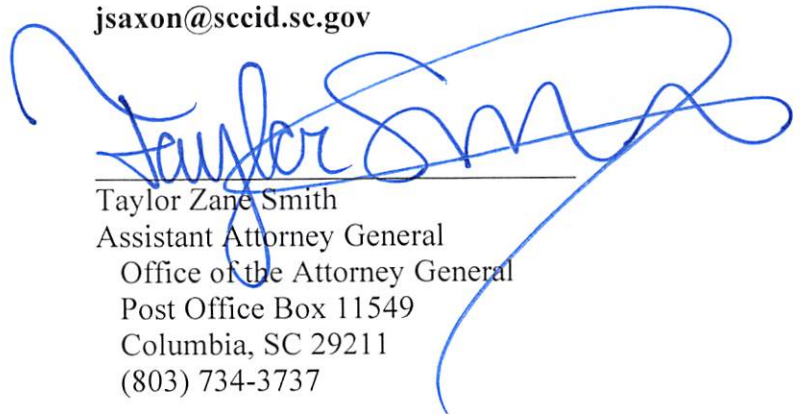
Respondent.

RETURN TO PETITION FOR REHEARING

Pursuant to the Supreme Court’s Order “RE: Operation of the Appellate Courts During the Coronavirus Emergency,” dated March 20, 2020, the undersigned hereby certifies a true copy of the Return to Petition for Rehearing has been served upon opposing counsel by sending to opposing counsel’s primary e-mail address as listed in the Attorney Information System (AIS):

Jessica M. Saxon, Esquire
jsaxon@scid.sc.gov

This 8th day of September 2022.



Taylor Zane Smith
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

RECEIVED**Sep 20 2022****SC Court of Appeals**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Pickens County
Alex Kinlaw, Jr., Post-Conviction Relief Judge
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acknowledgement of the trial court's decision to allow the argument and a concession that the decision was correct. This Court should not grant rehearing on this issue.

Petitioner's cross-examination of the minor victim

When Petitioner cross-examined of the minor victim, the first question that he tried to ask her was whether she had told anyone that her father would make her take a cold shower while clothed if he caught her lying. App. 88-90. The State objected and, outside the presence of the jury, argued that Petitioner's questions on that topic should be prohibited as irrelevant and violative of Rule 403, SCRE. Petitioner argued that the issue was a proper subject of his cross-examination because the minor victim's credibility was central to the case. App. 90-91. The State countered that Petitioner should not be able to ask about "particular punishments" because there was too great a danger of unfair prejudice. App. 91. The trial court then asked if there was any evidence of interaction between the minor victim and her father regarding the child's sexual abuse allegations against Petitioner. App. 91. The trial court allowed Petitioner to examine the minor victim outside of the jury's presence and said that, afterwards, he would "tell them [the parties] what they can and cannot do" App. 93. After considering the proffered testimony, the trial court ruled as follows:

All right. The question about her being pushed in the shower and put under cold water, the [c]ourt finds that not relevant. If it is relevant, it's excluded under 403. Now, I could see how it could become relevant, but based on the proffer that was given, I do not see that it is. The part about the television is relevant and it's admissible.

App. 95.

This Court found, in complete agreement with the trial court, that Petitioner's questions were not relevant and, even if they were relevant, they were inadmissible under Rule 403. On these points, Respondent relies on the arguments presented in its brief. As to Petitioner's argument that this Court erred in finding, in reliance upon *State v. King*, 349 S.C. 142, 561 S.E.2d 640 (Ct. App.

2002), that the record indicates that the trial court was cognizant of Rule 403 when conducting its analysis of the parties' arguments, Respondent submits that it is apparent from the record that the trial court considered whether the probative value of the minor victim's testimony was substantially outweighed by the danger of unfair prejudice. The trial court found that the evidence was not relevant and then found that, even if it was relevant, it was prohibited under Rule 403. The trial court's juxtaposition between Rules 401 and 403 shows that it considered Rule 403. Obviously, the trial court determined that the evidence fell short of the requirement of Rule 401 and, as a consequence, any probative value that it had, if any, would necessarily be "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" Rule 403, SCRE. This Court did not err in its findings and should not grant rehearing.

CONCLUSION

In affirming, this Court did not overlook or misapprehend any point, and it should deny the petition for rehearing.

Respectfully submitted,

ALAN WILSON
Attorney General

TAYLOR ZANE SMITH
Assistant Attorney General
SC Bar No. 103282

By: s/Taylor Zane Smith
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

September 20, 2022

RECEIVED**Sep 20 2022****SC Court of Appeals**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Pickens County
Alex Kinlaw, Jr., Post-Conviction Relief Judge
William P. Keesley, Trial Judge
Appellate Case No. 2019-000437

JUSTIN RYAN CONE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of Respondent's amended return to the petition for rehearing has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Jessica M. Saxon, Esquire
jsaxon@sccid.sc.gov

This 20th day of September, 2022.

s/Taylor Zane Smith
TAYLOR ZANE SMITH
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

The South Carolina Court of Appeals

Justin Ryan Cone, Petitioner,

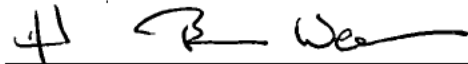
v.


State of South Carolina, Respondent.

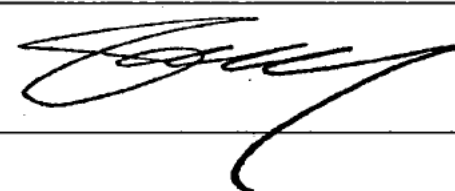
Appellate Case No. 2019-000437

ORDER

After careful consideration of the petition for rehearing,¹ the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C. J.

 J.

 J.

Columbia, South Carolina

cc:

Taylor Zane Smith, Esquire
 Jessica M Saxon, Esquire
 Alan McCrory Wilson, Esquire
 Justin Ryan Cone, 362238
 The Honorable Alex Kinlaw, Jr.

FILED
Sep 22 2022

¹ We also grant Respondent's motion to amend its return to the petition.